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No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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The petition for a writ of certiorari explained that the courts of appeals are in disarray regarding the requirement of a heightened pleading standard and a direct evidence standard in cases involving qualified immunity. Recent decisions of the courts of appeals, issued after the petition was filed, have exacerbated the conflicts among the circuits. These conflicts leave federal jurisprudence uncertain and allow the choice of forum to be dispositive in the many *Bivens* actions where motive is at issue.

As the petition also explained, five Justices of this Court have expressly criticized the direct evidence standard in this context and six members of the District of Columbia Circuit wrote in this case that Supreme Court review is essential. Immediate resolution of

these conflicts among the circuits is vital to restore uniformity and to establish a proper balance between an individual's right to seek vindication for constitutional wrongs and the ability of government officials to be free from insubstantial claims.

Respondents' brief in opposition only confirms that this case warrants certiorari. Respondents concede that the District of Columbia Circuit stands alone in requiring direct evidence in cases involving qualified immunity, and the decision below, therefore, conflicts with every other court of appeals that has addressed this requirement. Moreover, despite respondents' protestations, the decision below squarely conflicts with decisions of other courts of appeals, which have concluded that this Court's opinion in *Leatherman* precludes judge-made heightened pleading standards in cases involving qualified immunity.

1. Respondents concede, as they must, that "no other circuit has adopted the 'direct evidence' formulation employed by the District of Columbia Circuit." Br. in Opp. 10. Nonetheless, respondents seek to diminish this admitted circuit conflict by characterizing the evidentiary difference as "merely one of degree." *Id.* But it was precisely this difference of "degree" that was dispositive in this case, resulting in dismissal of petitioner's *Bivens* claim. It is undisputed that if the standard articulated by other courts of appeals had been applied here, petitioner's claim would not have been dismissed. Even respondents' counsel below acknowledged that this case turns on the pleading standard: "If plaintiff's standard of pleading and proof is applied to this case, we agree that summary judgment was properly denied." Appellants' Reply Brief (D.C. Cir., No. 91-

5315) at 2. Events subsequent to the filing of the petition confirm the existence of a growing conflict among the circuits. The Fifth Circuit has now joined the Sixth, Seventh and Ninth circuits in rejecting the direct evidence requirement employed by the District of Columbia Circuit in this case. *Tompkins v. Vickers*, 26 F.3d 603, ___ (5th Cir. 1994)("[R]equiring direct evidence . . . effectively insulate[s] from suit public officials who deny an improper motive"). *See* Pet. 12-13.[1]

2. Unable to deny this circuit conflict, respondents instead contend that the District of Columbia Circuit's heightened pleading requirement is justified by unexplained "policy reasons." Yet, respondents agree there is no probative difference between direct and circumstantial evidence. Br. in Opp. at 11 (the direct evidence requirement is "*not* because [direct evidence] is adjudged intrinsically superior in terms of its probative value")(emphasis in original); *see* Pet. App. 18a (Williams, J., concurring)("The distinction between direct and circumstantial evidence . . . appears completely arbitrary and unrelated to the strength of the plaintiff's

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[1] Implicitly acknowledging the strength of petitioner's evidence of wrongdoing, respondents resort to arguing that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), created a "presumption" of good faith that is "*not* rebuttable" and "could be read to bar any *Bivens* action that is predicated upon an unconstitutional motive." Br. in Opp. 9 (emphasis in original). Nothing in *Harlow* remotely suggested any "bar" of *Bivens* claims, and "[e]very Circuit that has considered the question has concluded that a public official's motive or intent *must* be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *Tompkins*, 26 F.3d at ___ (emphasis added).

case"); Pet. 13-14. In any event, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* explicitly rejected judicial "policy" as a license for imposing heightened pleading standards contrary to the Federal Rules of Civil Procedure. 113 S. Ct. 1160, 1163 (1993)(stating that such results "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"); *see Harlow*, 457 U.S. at 808 (holding that frivolous claims should be eliminated by "firm application of the Federal Rules of Civil Procedure," quoting *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)).

In this case, petitioner presented tangible, nonconclusory, and concrete evidence of a constitutional wrong that was sufficient to allow the case to proceed absent the District of Columbia Circuit's direct evidence standard. As the district court explained: "[I]n this case the distinction . . . is crucial, . . . while the record before the Court on the key issue of defendants' motive is circumstantial, it is also tangible and far from being merely conclusory." Pet. App. 50a-51a.

3. The Court's reservation in *Leatherman* of the question whether heightened pleading standards are permissible in cases involving individuals asserting qualified immunity further crystallizes the need for review. In two opinions subsequent to the petition, the Seventh Circuit, relying on *Leatherman*, rejected a heightened pleading standard in individual liability cases. *See Baxter v. Vigo City School Corp.*, 26 F3d 728, ___ (7th Cir. 1994), at *14 ("[T]he Supreme Court recently has made very clear [that] there is no heightened pleading requirement for civil rights actions"); *Dell v. Board of Educ.*, No. 93-1206, 1994 U.S.

App. LEXIS 21146, at *38 (7th Cir. August 9, 1994) ("[W]e must refrain from imposing a heightened pleading requirement on this civil rights action"). *See also Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994)(stating that "heightened pleading standards[s] do[] not apply to § 1983 claims");[2] *see also Fobbs v. Holy Cross Health Sys. Corp.*, No. 92-15852, 1994 U.S. App. LEXIS 17490, at *25 (9th Cir. July 19, 1994)("[T]he Supreme Court has . . . rejected heightened pleading standards under the Federal Rules of Civil Procedure for almost all claims except fraud and mistake").[3]

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[2] There is no basis for respondents' attempt to belittle the conflict *Black* creates by stating that "the Seventh Circuit engaged in no analysis in citing *Leatherman*." Br. in Opp. 13. It would be more accurate to say the Seventh Circuit regarded the guidance of *Leatherman* to be so clear that no further discussion was warranted. In any event, the Seventh Circuit's subsequent reliance on *Leatherman* in *Baxter* and *Dell* confirms the ongoing conflict with the District of Columbia Circuit.

[3] Respondents assert that the First Circuit's decision in *Oropallo v. Parrish*, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) and the Seventh Circuit's ruling in *Bombliss v. Lee*, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994), rejecting heightened pleading standards in qualified immunity cases, do not contribute to the circuit split because they are unpublished. To the contrary, the Seventh Circuit's decisions in *Black*, *Dell* and *Baxter*, three published cases, make reliance on *Bombliss* merely illustrative. Moreover, neither *Oropallo* nor *Bombliss* announced a new legal rule; thus, under applicable circuit rules, publication was not warranted. 7th Cir. R. 53(a); *id.* at 53(c) ("[w]hen the decision does not satisfy the criteria for publication . . . it *will be* filed as an unpublished order")(emphasis added); *see* 1st Cir. R. 36.2(a) (stating that publication may be forgone when the opinion, *inter alia*, does not "articulate a new rule of law").

For these reasons, and those set forth in the petition, the same claim that would be dismissed in some courts of appeals would proceed to trial in others. This conflict on the qualified immunity of public officials is important, recurring and plainly warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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